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IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. 589

PORT CONSTRUCTION COMPANY,

Petitioner,

v.

VIRGIN ISLANDS HOUSING AUTHORITY,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MEMORANDUM FOR THE RESPONDENT IN OPPOSITION

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Statement of the Case

Plaintiff, a Florida corporation, was awarded a contract by the defendant, a public body corporate, to build a housing project at Charlotte Amalie, St. Thomas, Virgin

Islands, consisting of forty-five buildings, for the sum of $3,375,841.00. The work was to be completed by November 16, 1961 which was the prescribed seven hundred fifty days from October 29, 1959, but actually took until April 30, 1963, five hundred thirty days in excess of the agreed period.

The plaintiff, after it was paid the contract price less some small deductions, instituted an "Action for Damages for Breach of Contract" on April 22, 1964 in the District Court of the Virgin Islands. The case proceeded to trial on February 6, 1968 and was tried intermittently thereafter as the court calendar permitted, until June 7, 1968.

The District Court filed its memorandum opinion (Appendix B annexed to the Petition) on September 30, 1968, finding for the defendant upon the merits.

The petitioner appealed to the United States Court of Appeals for the Third Circuit. The Court of Appeals affirmed the judgment of the District Court (Appendix A annexed to the Petition) and held specifically that Paragraph 13(b) of the Contract precluded any claim for damages for delay (Appendix A2). A motion by the petitioner for a rehearing was denied by the Court *en banc* on May 25, 1970 (Appendix B6).

ARGUMENT

The opinions of the Court of Appeals for the Third Circuit and of the District Court of the Virgin Islands are in accord with applicable decisions.

The petition is based upon the presumptuous and erroneous assumption that the Court of Appeals, at the time of the original consideration of the appeal and upon the

rehearing, "gave no consideration to the record or to whether or not Respondent's interference was active" (Pet. p. 4).

The Court of Appeals in specific language and by citing and relying upon its previous opinion in *F.D. Rich v. Wilmington Housing Authority*, 392 F. 2d 841 (1968), held the contract provision binding. By so holding, there is a clear indication that the record, which in its entirety was before that court and twice reviewed, furnished no basis for avoiding Paragraph 13(b) under the exceptions discussed in the *Rich* case at p. 843:

> "Such a clause is now universally accepted as valid, 5 Corbin on Contracts, § 1068, p. 388 and n. 87, (1964), although it is, of course, to be strictly construed against the owner (citations omitted) . . . . (There may be argued) three well recognized exceptions to its operation:
>
> (1) Where the delay is the result of bad faith on the part of the public authority;
>
> (2) where the delay is of such a nature that it was not foreseeable by the parties;
>
> (3) where the delay is so extensive that it constitutes an abandonment of the contract (case references omitted)." (392 F. 2d at 843)

Petitioner's basic misconception that the Court of Appeals ignored the record leads petitioner to assert a further erroneous conclusion that a conflict exists in decisional law which should be resolved by this Court. We submit that there is no conflict between the decisions in this case and other cases decided by federal or state courts. The general rule that the no-damage clause, as any other contract provision, will be enforced in the absence of

pleading and proving facts in avoidance such as fraud, duress, or inequitable conduct, has been considered by this and other federal courts in cases too numerous to cite. The following are sufficient for illustration:

Wells Bros. Co. of N.Y. v. *United States,* 41 S. Ct. 34, 254 U.S. 83 (1920).

Anthony P. Miller, Inc. v. *Wilmington Housing Authority,* 165 F. Supp. 275 (1958).

Wood v. *United States,* 258 U.S. 120; 121 (1921).

Robinson v. *United States,* 261 U.S. 486, 490 (1922).

Crook Co. v. *United States,* 270 U.S. 4, 6 (1925).

United States v. *Rice,* 317 U.S. 61, 65 (1942).

City of Orlando v. *Murphy,* 84 F. 2d 531, 536 (C.A. 5, 1936).

City or Orlando v. *Murphy,* 94 F. 2d 426, 430 (C.A. 5, 1938).

United States v. *Croft-Mullins,* 333 F. 2d 772, 778 (C.A. 5, 1964), c.d. 379 U.S. 968.

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Kehm Corp. v. *United States,* 93 F. Supp. 619, 625 (119 C.Cls. 471).

Accordingly there is no need for further discussion, redeclaration, elaboration, clarification, interpretation or revision of the contract rules already laid down by the courts and applied to this case.

Petitioner obtains no support from the cases it cites. Of the ten cases listed in the index four were decided by the federal courts. The first argument advanced by petitioner to overcome the effect of the rulings in the *Wells* and *Miller* cases (Pet. p. 5), that the language of the exculpatory clause was different in these cases, is invalid because it loses sight of the fundamental principle involved, i.e. clear and unambiguous contract provisions will be enforced unless reasons for avoidance are established. As a matter of fact, in the *Miller* case the identical no-damage clause was involved. The second argument made to distinguish the *Miller* case by claiming the court failed to consider *Wells* and a state court decision in *Hill* v. *City of Duluth* requires no comment. The *Ozark* case (Pet. pp. 7-8) upon which petitioner heavily relies merely stands for the proposition that whether there is sufficient showing to avoid a contractual exculpatory clause is a question of fact and the motion addressed to the pleadings was denied. However, after trial on the merits, the Court of Claims held:

> "We do not find, on the part of the Governor's representatives, any negligence, wilful or even ordinary, which was a cause of the damages suffered by the plaintiff. Even in the absence of the exculpatory clause relied upon by the Government, it would not be liable for those damages. *United States* v. *Howard P. Foley Co.*, 329 U.S. 64, 67 S. Ct. 154, 91 L. Ed. 44. *A fortiori*, it is not liable when the contract contains the exculpatory clause." 288 F. 2d 913, 918 (1961).

The latter two rulings are precisely what the Court of Appeals and the District Court applied in the instant case.

As far as the state court decisions are concerned *Psaty*, 76 R. I. 87, 68 A. 2d 32 (1949) (Pet. pp. 5, 6, 8) supports the decisions rendered herein and petitioner seeks to avoid its effect by asserting language differences. Also in accord with the foregoing principle is *Kaplen* (Pet. p. 7), which the petitioner makes no attempt to distinguish. In *Algernon Blair*, (Pet. p. 6) the court merely held summary judgment was inappropriate because of the charges and remanded the case for trial. *Hubbell* (Pet. p. 6) is a case where factual proof furnished grounds for avoiding the contractual limitation. In *McGuire* (Pet. p. 5), the City had the affirmative obligation to provide rights of way under a clause creating a condition precedent to the contract and having breached that express covenant, thereby preventing the contractor from entering the land to perform, the City was held liable. The case is thus readily distinguishable legally and factually.

CONCLUSION

The language of this "no-damage" provision has endured long standing usage and has become common in these contracts. This usage itself is a testimonial to its importance in construction contracts. And the law has grown with it. There is no conflict in the law; nor does it leave latitude for abuse. Had the petitioner made a factual showing, which the District Court found it did not, supporting its allegations of bad faith or other low standards of conduct, it would have found redress in the law. After the lengthy trial herein and the careful consideration given to the petitioner by the District Court and the

Court of Appeals, it is quite evident that there is no merit to the application for a Writ of Certiorari in this case.

Respectfully submitted,

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V.

VIRGIN ISLANDS HOUSING AUTHORITY,
RESPONDENT

PETITION FOR REHEARING OR ORDER
DENYING PETITION FOR WRIT OF CERTIORARI

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Your Petitioner, Port Construction Company, respectfully requests that this Court grant rehearing of its Order dated November 16, 1970, which denied certiorari, and that the Court now grant certiorari.

The petition for certiorari filed herein presented the question of whether or not a "no damage" clause in a contract of the

Virgin Islands Housing Authority, partially financed by the United States, providing that "no payment . . . shall be made to the Contractor for damages because of hindrance or delay from any cause in the progress of the work, whether such hindrances or delays be avoidable or unavoidable" prohibits recovery by Contractor of damages for delays in the performance of the work occasioned by active interference in such performance by the Housing Authority? A related question was whether or not the provision was invalid as contrary to public policy.

At the time of the presentation of the Petition herein, Petitioner did have other substantial grounds available, but did not present them in the belief that the questions presented were of the kind and character requiring a review by this Court. Petitioner, believing that the other grounds are sufficiently substantial to justify this Court in reviewing the decision below, presents them in this Petition for hearing.

GROUNDS FOR THIS PETITION

The United States Court of Appeals for the Third Circuit, in its decision, in this case, has decided an important territorial question in a way in conflict with applicable territory law. The posture of the case before the United States Court of Appeals for the Third Circuit, at the time of its decision, the nature and importance of the territorial question and the territorial law involved, and the manner in which the Court decided the case are hereinafter set forth.

THE POSTURE OF THE CASE AT THE TIME OF THE DECISION BELOW

As indicated in the Petition for a Writ of Certiorari filed herein this Action was brought in the District Court of the Virgin Islands for breach of the express and implied provisions of a Contract for the construction of low-cost public housing on the island of St. Thomas, Virgin Island of the United States (R5, par. 1 - 12). At the close of Petitioner's case Respondent moved to dismiss, principally on the ground that the "no damage" clause, Section 13 (b) of the Contract prohibited recovery (R4, pp 3, 4). Respondent renewed its Motion at the close of the case. The District Court Judge after considering the matter granted the Motion but not on the basis of the "no damage" clause. (R5, pp 154 - 159). It is suggested that in granting the Motion to Dismiss the District Court clearly failed to find the facts specially and state separately its conclusions of law as required by Rules 41(b) and 52(a) F.R.C.P. Petitioner took an Appeal to the United States Court of Appeals for the Third Circuit, on that ground.

Therefore, that Court did not and could not have had before it the necessary special findings of fact and conclusions of law from which it could have determined whether or not, under territorial law, Respondent's interference was active interference, and therefore not within the exculpatory provisions of the "no damage" clause, if that were in fact the applicable territorial law. The Court of Appeals, nevertheless, after considering the briefs and oral argument decided that the "no damage" clause was a bar